1951 . **File No.** Prev of Fragmentation/51

Legal Dept.

A. **BRANCH**

SD 1077

Subject:— opinions —

Under the Bombay Prevention of Fragmentation and Consolidation Holdings Act- 1947.

Fragmentation
51

538-A

C O N T E N T S.

Legal Department File No.O.Prev. of Fragmentation/1951.

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Shri Gosavi has raised the following two points for consideration: -

(1) Where a decree is for partition of land and the Collector finds that the land cannot be partitioned without contravening the provisions of section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, how the decree of the Civil Court should be executed?

(2) Where by a maintenance decree the widow is intitled to cash amount and in default of payment, to possession of a portion of land and the partition of such a land results in a fragment what relief the widow should be given?

2. Under section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act no land in any local area shall be transferred or partitioned so as to create a fragment. Section 11 provides: "When a decree is transferred under section 54 of the Civil Procedure Code, 1908, for the partition of an undivided estate, assessed to the payment of revenue to the Government in any local area for which standard areas have been fixed or for the separate possession of a share of such an estate, no such partition or separation shall be made so as to create a fragment." It is clear from these provisions that when the Collector finds that the partition of a revenue paying land in execution of a decree transferred to him under section 54 of the Civil Procedure Code would result in a fragmentation, he will have to stay his hand and not to partition the land. The Act contains no specific provision as to how the relief under the decree should be given +

be given to the parties in such a case. If at the time of the decree the land is situate in any area which is determined to be a local area under section 3 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, so as to prevent a partition of the land under section 8 of the said Act, the decree would be incapable of execution and is not capable of execution by the Collector (see Ramchandra v. Sukhadia (1935) A.I.R. (Nag.) 133). If, however, after passing the decree, such area has become a local area for the purposes of the said Act the proper procedure would be for the parties to apply to the Court for the amendment of the decree (see Satappa v. Mulchand, I.L.R. 60 Bom. 516). If the decree has been transferred to the Collector for execution, the Collector should refer the parties to the Court for the amendment of the decree and the Court then can revise its orders directing partition by metes and bounds. In order to avoid such difficulties and to enable the parties to get proper reliefs, it will be desirable to take steps to amend the Bombay Prevention of Fragmentation and Consolidation of Holdings Act providing for the relief to the parties in the event of the execution of the decree by partitioning the land by metes and bounds, would result in a fragmentation.

Sd-

Remembrancer of Legal Affairs.

C.G.R. 30-6

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No. 8825

Legal Department,

Bombay Castle (Bombay No.1), 5th June 1951.

To

Shri D.K. Gosavi, M.L.A.,
3, Pratap Ganj Peth,
Satara City.

Subject: - Difficulties exprienced in execution of partition decrees vis-a-vis Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

Sir,

With reference to your letter dated the 24th March 1951 addressed to H.M. (Law), I am directed to inform you that it is not necessary to amend the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 and when the Collector finds that he cannot execute the decree for partition in view of the provision of this Act, he would return the same to the Court, which then will follow the provisions of the Indian Partition Act, 1893.

Yours faithfully,

o/c Sd/-

Deputy Secretary to Governmm

It appears that one Shri Madhao Trimbak Wani holds Survey No. 93 measuring 4 acres and 18 gunthas assessed for agriculture. He has applied for permission to use 2 acres from his holding for building purposes. If his request is granted the remaining area would be less than the standard area determined under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The questions reised for the R.L.A's consideration are whether by permitting the non-agricultural use of 2 acres of land the Prant Officer will indirectly allow the creation of a fragment and whether his action would be contrary to the provisions of section 8 or any other provisions of the Act.

Section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 provides that no land in any local area shall be transferred or partitioned so as to create a fragment. "Fragment" as defined in section 2(4) means a plot of land of less extent than the appropriate standard area determined under this Act. It is clear from these provisions that what is prohibited by section 8 is the transfer or partition of land so as to create a fragment. The term 'transfer' means to convey or to pass the right of one person over to another and 'partition' means a division between co-owners (whether coparceners, joint tenants in common) of lands, tnements, hereditaments held by them, the effect of such division being that the joint ownership is terminated and the shares of the parties vested in them in severalty. (See Iyer's Law Lexicon) The conversion of a part of the agricultural land for a non-agricultural purpose involves neither transfer nor partition. (Contd)

Consequently, section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 would not be attracted and there would be no legal objection to the Prant Officer granting permission to Shri Madhao to convert 2 acres from his holding for a non-agricultural purpose and it would not be contrary to the provisions of the Act.

o/c Sd/-

Additional Secretary to Government

U.R. to R.D., No. 6735, dated the 27th April 1951.

C.G.R. 30-6

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Legal Department.

Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

Section 9(1).

It appears that in execution of a partition decree the Collector of Ratnagiri partitioned the lands on 26-7-1949 and possession was actually handed over to the parties on 24-8-50, that, is, after the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, came into operation in the area, with the result that the partition affected by the Collector has turned out to be in contravention of section 8 of that Act. The Collector has, therefore, now taken action to re-partition the lands, so as to conform to the provisions of the Act and has directed the Mamlatdar to cancel the possession already handed over to the parties. The Revenue Department has raised the question whether it would be legally correct for the Collector to cancel the possession and to re-partition the lands in this case when possession of the partitioned lands has been handed over to to the parties.

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2. In Krishnaji Narayan v. Damodar Parashram

(5 B.L.R. 648) the Bombay High Court held:

> "When a Collector has once made a partition acting under section 265 of the Civil Procedure Code (Section 54 of the present Civil Procedure Code), there is nothing to prevent him from revising the partition for maistake ~~in for mistake~~ or other cause ~~befo retrha cause~~ before he has passed the final orders and return the proceedings to the civil court. If any party feels a grievance at the partition made by the Collector, his remedy is to approach the executing court and it is not open to him to question the Collector's action by a Separate suit. If neither of the parties has gone before the court and complained of the fresh partition made by the Collector, his actior cannot be questioned by a separate suit."

In the present case the partition effected by the Collector was clearly in contravention of section 8 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947. Section 9(1) of that Act provides that the transfer or partition of any land contrary to the provisions of this Act shall be void. It follows, therefore, that the partition effected by the Collector is viod and the possession of the lands handed over to the parties cannot be considered as lawful possession. It is not known whether the Collector has returned the proceedings to the civil court. If he has not so done, there would not be any legal objection to the Collector cancelling the previous order of partition and ordering re-partition in canformity with the Bombay Prevention of Fragmentation and Consolidation of Holdings Act. If he has already returned the proceedings to the civil court, he may write to the civil court stating all the facts and requesting retransfer of the proc edings for partitioning the lands so as to conform to the provisions of the aforesaid Act. If the parties are willing to a fesh partition, no legal difficulties can arise.

o/c Sd/-
Additional Secretary to Government.

U.R. to R.D. No. 13471, dated the 22nd August 1951.

C.G.R. 1-7-